No. 74-1510

Supreme Court, U. S.
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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

v.

WILLIAM R. BURKETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioner, a federal district court judge, contends that the court of appeals erred in reversing his summary disbarment of a United States Attorney, four Assistant United States Attorneys, and a regional counsel for the Internal Revenue Service, and in issuing a writ of mandamus ordering him to vacate orders to show cause why those government attorneys should not be held in contempt.

This case arises out of events that occurred in the course of litigation brought by David Hall and Jo Evans Hall in the United States District Court for the Western District of Oklahoma. The Halls' complaint listed as de-

fendants William R. Burkett, United States Attorney for the Western District of Oklahoma, Floyd E. Carrier, United States Marshal for the Western District of Oklahoma (who was later dismissed as a party), and Clyde L. Bickerstaff, Oklahoma District Director of the Internal Revenue Service, and it alleged that the Internal Revenue Service was considering commencement of civil and criminal tax fraud proceedings against the Halls and that the Service had certain records that had previously been in the possession of David Hall's former secretary, Dorothy Pike (Pet. App. A, pp. 2a-3a). The Halls requested an injunction barring the defendants from interfering with their efforts to interview Ms. Pike and examine records and documents in her possession (*ibid.*). The Halls' suit was assigned to petitioner Stephen S. Chandler, a United States District Judge for the Western District of Oklahoma (*ibid.*).

During preliminary hearings in that case, the United States Attorney, Mr. Burkett, who was both a party defendant and counsel for the defendants, testified that none of the defendants was interfering with the Halls' efforts to see Ms. Pike, that he did not know Ms. Pike's whereabouts, and that Ms. Pike was receiving protection from the Internal Revenue Service at her request because she feared for her personal safety (Pet. App. A, p. 5a). Petitioner urged the parties, including the defendants, to cooperate in getting Ms. Pike's testimony, and he issued several subpoenas for her deposition (Pet. App. A, pp. 5a-7a). Mr. Burkett objected to the issuance of the subpoenas, contending that petitioner was acting without jurisdiction in the matter (Pet. App. A, pp. 6a, 11a). He advised petitioner that under the circumstances the government would not voluntarily assist in the search for Ms. Pike (Pet. App. A, p. 5a). On January 28, 1974,

petitioner ordered the parties to the suit, including Mr. Burkett, to assist in the search for Ms. Pike (Pet. App. A, p. 7a).

Upon receipt of the order, Mr. Burkett requested the Internal Revenue Service to attempt to locate Ms. Pike; she was located by the Service in Arlington, Virginia, and Mr. Burkett so advised the Marshal, who served her with a subpoena on January 29, 1974 (Pet. App. A, p. 7a). On January 30, 1974, Mr. Burkett filed a petition for a writ of prohibition and mandamus in the United States Court of Appeals for the Tenth Circuit, seeking to prevent Ms. Pike from being compelled to appear in court (Pet. App. A, pp. 7a, 12a). The court of appeals issued a "preemptory writ" to petitioner on the same day, staying all further proceedings in the suit and directing him to show cause why the writ should not be made permanent (Pet. App. A, p. 7a). Subsequently, on June 7, 1974, the court of appeals ruled that petitioner had no jurisdiction to entertain the Halls' suit, and it issued a writ of prohibition and mandamus directing him to dismiss it.[1]

On March 11, 1974, while the petition for a writ of prohibition and mandamus was pending before the court of appeals, petitioner *sua sponte* issued a "Judgment of Disbarment" against the United States Attorney, Mr. Burkett, four of his assistants, and the regional counsel for the Internal Revenue Service.[2] The judgment declared that the attorneys "are hereby DISBARRED and the Clerk of this Court is hereby ORDERED to strike their names from the roll of attorneys admitted to prac-

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[1]The June 7, 1974, order of the court of appeals is set forth at Pet. App. A, pp. 15a-17a, as Appendix A to Pet. App. A.

[2]The judgment of disbarment is set forth at Pet. App. A, pp. 17a-20a, as Appendix B to Pet. App. A.

tice before the United States District Court for the Western District of Oklahoma" (Pet. App. A, p. 20a). The judgment recited as reasons for the disbarment that the government attorneys had "wilfully and corruptly" conspired to conceal the whereabouts of Ms. Pike from petitioner and therefore were guilty of "obstructing and impeding justice"; that Mr. Burkett had committed "perjury" when he denied personal knowledge of Ms. Pike's whereabouts at the initial hearing; that the other government attorneys had known of this "perjury" and had failed to reveal it to petitioner, thereby committing the crime of "Misprision of Felony"; that the named attorneys had conspired to injure the Halls "in the free exercise and enjoyment of their civil rights"; and that they had conspired to conceal from petitioner the filing of the petition for a writ of prohibition and mandamus in the court of appeals on January 30, 1974 (Pet. App. A, pp. 18a-19a). No formal complaint preceded the issuance of the judgment of disbarment, and the attorneys received neither prior notice that disbarment proceedings were being instituted against them nor a prior opportunity to be heard with respect to the specific charges. The judgment did state, however, that the attorneys had ten days in which to petition for reinstatement in accordance with the district court's Local Rule 4(j)(1) (Pet. App. A, p. 20a; see also Pet. App. B, pp. 23a-24a).

Also on March 11, 1974, petitioner ordered the attorneys to show cause within ten days why they should not be held in civil and criminal contempt for having committed the above "crimes" (Pet. App. C, pp. 25a-27a).

On the following day, March 12, 1974, Mr. Burkett, on behalf of all the government attorneys subjected to the judgment of disbarment and the order to show cause, filed a second petition for a writ of prohibition

and mandamus in the court of appeals (Pet. App. A, p. 4a). The court of appeals issued an order the same day staying the disbarments until further order; and on March 21, 1974, it issued an order staying the contempt proceedings until further order (*ibid.*). Mr. Burkett later filed notices of appeals from both the judgment of disbarment and the order to show cause (Pet. App. A, p. 2a).

On November 7, 1974, the court of appeals reversed the judgment of disbarment and issued a writ of prohibition and mandamus directing petitioner to vacate the order to show cause (Pet. App. A, pp. 1a-14a). The court held that the judgment of disbarment was invalid because petitioner had failed to give the government attorneys prior notice and an opportunity to be heard (Pet. App. A, pp. 8a-9a). The court of appeals also reviewed the substance of petitioner's charges against the government attorneys, and concluded that "the dearth of evidence in support of the adjudications is so plain that the accused attorneys are not to be subjected to meaningless procedure in connection with these contempt citations" (Pet. App. A, p. 13a). Because it found the circumstances of the case "exceptional," it held that "mandamus is an appropriate remedy" with respect to the order to show cause (*ibid.*).

The judgment below is correct and the questions raised by petitioner do not warrant further review.

1. Due process requires that an attorney charged with a disbarment offense be given "fair notice as to the reach of the grievance procedure and the precise nature of the charges * * *." *In re Ruffalo*, 390 U.S. 544, 552. Before judgment of disbarment may be entered, the attorney also must be afforded "ample opportunity of explanation and defence." *Ex parte Robinson*, 19 Wall. 505, 512. The court of appeals correctly concluded that these principles required reversal of the district court's disbarment order.

Petitioner contends (see Pet. 11) that the requirements of due process were satisfied by the attorneys' right to "seek relief from [the disbarment] order by written petition showing cause for the relief sought [pursuant to Local Rule 4(j)(1)]" (Pet. App. B, p. 23a). That contention is, of course, directly contrary to this Court's holding in *Ruffalo* that the attorney is entitled to "fair notice." Nor do we believe that the right to file a written petition constitutes "ample opportunity of explanation and defence." Cf. *Goldberg* v. *Kelly*, 397 U.S. 254. At least in a case such as this, involving a lawyer's substantial property interest in his right to practice law, due process requires something more than merely a post-adjudication hearing on paper. See *In re Ming*, 469 F.2d 1352, 1355 (C.A. 7).[3]

2. The court of appeals did not abuse its discretion in issuing the writ of mandamus directing petitioner to vacate his order to the government attorneys to show cause why they should not be held in contempt. The court of appeals reviewed the history of the proceedings in the district court and concluded (Pet. App. A, p. 13a):

> [T]he dearth of evidence in support of the adjudications [of disbarment] is so plain that the accused attorneys are not to be subjected to meaningless procedure in connection with these contempt citations. It would be time consuming, expensive and would hinder performance of official duties. In addition, further proceedings would continue the turmoil. It is our opinion in view of this that the mandamus is an appropriate remedy here.

[3]Petitioner suggests (Pet. 11) that the existence of the post-adjudication remedy of filing a petition for review rendered the judgment of disbarment nonfinal and therefore nonappealable. But that judgment was, as the court of appeals noted (Pet. App. A, p. 9 n. 5), unquestionably final. The existence of a right to file a petition for review under Local Rule 4(j)(2), like the existence of a right to file a motion for reconsideration under Rule 60(b), Fed. R. Civ. P., does not render nonfinal an otherwise final adjudication.

Contrary to petitioner's claim (Pet. 12), this is not a case where the extraordinary writ of mandamus was used as a substitute for an appeal. The very purpose of the issuance of the writ was to forestall further proceedings in the district court, a purpose that could not have been achieved merely by taking an appeal from a subsequent order of contempt. In view of the additional disruption that such further proceedings were likely to entail, the court of appeals acted properly in granting the writ of mandamus. See, *e.g.*, *Will* v. *United States*, 389 U.S. 90, 95; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260; *United States* v. *Dooling*, 406 F.2d 192, 198-199 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States*, 395 U.S. 911; *United States* v. *Igoe*, 331 F.2d 766, 769 (C.A. 7).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.